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In the Supreme Court of the United States

OCTOBER TERM, 1979

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

ASSOCIATED DRY GOODS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–13a) is reported at 607 F.2d 1075. The opinion of the district court (Pet. App. 16a–32a) is reported at 454 F. Supp. 387.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on October 10, 1979. The petition for a writ of certiorari, which was filed on January 7, 1980,

was granted on March 17, 1980 (App. 113). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5(b) and 2000e–8(e), prohibit the Equal Employment Opportunity Commission from disclosing, prior to the institution of suit, information obtained during its investigation of a charge to the parties immediately involved in the charge.

STATUTES AND REGULATIONS INVOLVED

Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5(b), provides in pertinent part:

> Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. * * * If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. * * *

Section 709(e) of Title VII, 42 U.S.C. 2000e–8(e), provides:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

Section 1601.22 of the Equal Employment Opportunity Commission regulations, 29 C.F.R. 1601.22, provides:

> Neither a charge, nor information obtained pursuant to section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709(c) and (d) of Title VII, shall be made matters of public information by the Commission prior to the institution of any proceedings under this Title involving such charge or information. This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State, and local authorities as may be appropriate or necessary to the carrying out of the Commission's function under Title VII, nor to the publication of data derived from such information in a form which does not reveal the identity of

charging parties, respondents, or persons supplying the information.

Section 1610.17(d) of the Commission's regulations, 29 C.F.R. 1610.17(d), provides:

> Special disclosure rules apply to the case files for charging parties, aggrieved persons on whose behalf a charge has been filed, and entities against whom charges have been filed. The special disclosure rules are available in the public reading areas of the Commission. Under sections 706 and 709, case files involved in the administrative process of the Commission are not available to the public.

Disclosure provisions of the EEOC Compliance Manual are set forth in the appendix to the petition (Pet. App. 33a–46a).

STATEMENT

A. Statutory and Administrative Background

Congress enacted Title VII of the Civil Rights Act of 1964 with the bold purpose of removing employment discrimination from the fabric of our national life. See Section 701 *et seq.* of Title VII, 42 U.S.C. 2000e *et seq.* Congress identified and declared unlawful certain discriminatory employment practices (Sections 703 and 704 of Title VII, 42 U.S.C. 2000e–2, 2000e–3), and created the Equal Employment Opportunity Commission ("Commission") as the principal enforcement agency in this area. Sections 705(a) and 706(a) of Title VII, 42 U.S.C. 2000e–4(a), 2000e–5(a). While Congress provided for the enforcement of the law by designing an interlocking system of administrative and judicial processes, the filing of a complaint with the

Commission[1] is a condition precedent to securing relief under Title VII. Sections 706 and 707 of Title VII, 42 U.S.C. 2000e-5, 2000e-6. Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

Once a charge has been filed, the Commission must undertake an investigation to determine whether the charge has merit: "Whenever a charge is filed * * * alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training * * * programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place, and circumstances of the alleged unlawful employment practice) on such [person] * * * within ten days, and shall make an investigation thereof." Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b). The statute further provides that "[c]harges shall not be made public by the Commission." *Ibid.*

If the Commission determines after investigation that there is reasonable cause to believe that the charge is true, it must attempt to eliminate the discrimination through "informal methods of conference, conciliation, and persuasion." *Ibid.* Title VII likewise provides that "[n]othing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as

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[1] When an adequate state or local remedy exists, the charge must first be filed with state or local officials. Section 706(c) of Title VII, 42 U.S.C. 2000e-5(c); *Love* v. *Pullman Co.*, 404 U.S. 522 (1972). A charge may be filed with the Commission 60 days thereafter. Section 706(c) of Title VII, 42 U.S.C. 2000e-5(c).

evidence in a subsequent proceeding without the written consent of the persons concerned." *Ibid.* It is unlawful for "any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its [investigative and recordkeeping] authority * * * prior to the institution of any proceeding under this subchapter involving such information." Section 709(e) of Title VII, 42 U.S.C. 2000e-8(e). Sections 706(b) and 709(e) both authorize the imposition of criminal penalties, including imprisonment for not more than one year, against Commission personnel who violate these provisions. 42 U.S.C. 2000e-5(b), 2000e-8(e).

Since 1965, the Commission has consistently construed Sections 706(b) and 709(e), the "public disclosure" provisions of Title VII, to permit limited pre-litigation[2] disclosure of investigatory materials to charging parties, respondents, and witnesses, where

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[2]The Commission regularly discloses factual materials to the parties during investigation and conciliation proceedings. On occasion, it is also necessary to disclose certain facts to material witnesses (see pages 21, 28-29, *infra*). Because a charging party may bring suit in federal district court even without a Commission determination that reasonable cause exists (Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1)), the Commission has also always permitted a charging party to review the Commission's file concerning his charge, with confidential material deleted, but only if he has filed—or contemplates filing—a civil action, and only if he executes a non-disclosure agreement. Prior to 1975, the Commission made such files available in these circumstances as a matter of practice. In 1975, the Commission codified that practice. See 29 C.F.R. 1610.17(d), 40 Fed. Reg. 8171 (1975); EEOC Compliance Manual § 83 (Pet. App. 33a). Normally, the charging party is not permitted access to his file until the expiration of the 180-day period during which the Commission has exclusive jurisdiction under Section 706(f)(1) of

such disclosure is deemed necessary or appropriate to the Commission's administration of the statute. On July 1, 1965, the Commission first published its construction of these provisions (30 Fed. Reg. 8409 (1965)):

> Neither a charge, nor information obtained pursuant to Section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to Sections 709(c) and (d) of said Title, shall be made matters of public information by the Commission prior to the institution under the title of a court proceeding involving such charge or information. This provision does not apply to such earlier disclosures to the charging party, the respondent, witnesses, and representatives of interested Federal, State, and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under the Title, nor to the publication of data derived from such information in a form

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Title VII, 42 U.S.C. 2000e-5(f)(1). EEOC Compliance Manual § 83 (Pet. App. 33a). Cf. 29 C.F.R. 1601.28 (a)(2). Charging parties are also permitted access, during administrative proceedings, to relevant information that may be contained in files concerning substantially similar charges against the same respondent. EEOC Compliance Manual § 83.7(c) (Pet. App. 43a). When substantially similar charges against the same respondent are filed contemporaneously, the Commission frequently consolidates them for investigatory purposes. In other circumstances, the Commission may rely in a later investigation on statistical data and other factual information accumulated in an earlier investigation of the same respondent. In those circumstances, it is necessary to provide a charging party with access to materials contained in other files because his own file will not contain all the information that is relevant to his case. In no circumstances, however, is the identity of any other charging party disclosed. EEOC Compliance Manual § 83.7(c) (3), (4) (Pet. App. 44a-45a). See pages 30-32, 36-43, *infra*.

> which does not reveal the identity of the charging party, respondent, or person supplying the information.

Although this rule has been amended in two minor respects since 1965,[3] the Commission's interpretation of the statute[4] has been consistent throughout this fifteen-year period, and the current rule (pages 3–4, *supra*) is identical in all material respects to that which the Commission promulgated in 1965.

As soon as a charge has been filed, the Commission must undertake an investigation and determine whether there is reasonable cause to believe that an unlawful employment practice has occurred. Section 706(b) of Title VII, 42 U.S.C. 2000e–5(b). In 1977, the Commission adopted a new investigative procedure. See 29 C.F.R. 1601.15, 42 Fed. Reg. 55388 (1977).[5] This procedure, which the Commission designed to

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[3] In 1971, the reference to "a court proceeding" was changed to "any proceedings." See 36 Fed. Reg. 20600 (1971). In 1977, the Commission amended the rule to provide that materials could be disclosed to the parties' attorneys as well as to the parties themselves. See 42 Fed. Reg. 47836 (1977). The 1977 amendment simply conformed the language of the rule to the Commission's longstanding practice (see App. 32–33).

[4] The Commission's long-standing interpretation of the statute is also reflected in its own memoranda (App. 32–[redacted]) and those of its general counsel (App. 32–33).

[5] Most current charges contain narrowly drawn allegations of discrimination and are processed through the "Rapid Charge Processing System." See *Hearings on Reorganization Plan No. 1 of 1978 Before the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 118, 132 (1978) ("Senate Reorganization Hearings"); EEOC Compliance Manual § 14.3(a). The Commission also identifies a small number of individual charges which it believes may form the basis of a Commission class action. Those charges are processed separately through the "Early Litigation

expedite its handling of charges, provides for the scheduling of a fact-finding conference with the parties early in the investigation, and well before the making of a reasonable cause determination. The fact-finding conference, which provides both parties with an opportunity to present their versions of the facts, is "primarily an investigative forum intended to define the issues, determine which elements are undisputed, to resolve those issues that can be resolved, and to ascertain whether there is a basis for negotiated settlement of the charge." *Ibid.*

The institution of fact-finding conferences, which are predicated upon early dissemination of factual information to both parties, has greatly increased the Commission's efficiency in settling disputes without resort to the judicial process. Whereas only 14% of the charges filed with the Commission resulted in settlement prior to 1977, the Commission currently settles 44% of its charges through conciliation. *Oversight*

Identification Program." See *Oversight Hearings on Federal Enforcement of EEOC Laws Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. 61–63 (1979) ("1979 Oversight Hearings"). EEOC Compliance Manual § 12. As of July 1979, only 200 charges had been designated for processing through the latter program. See 1979 Oversight Hearings 63. A third system is used for processing charges alleging systemwide discrimination, which charges are typically filed by a member of the Commission. *Id.* at 59–61; EEOC Compliance Manual §§ 12.1(b), 16. Only narrowly-drawn individual charges were filed by the charging parties here. In *Burlington Northern, Inc.* v. *EEOC*, 582 F. 2d 1097 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979), and *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978), by contrast, the investigatory files had been compiled pursuant to a Commissioner's charge of systemwide discrimination. See page 32, note 19, *infra*.

Hearings on Federal Enforcement of EEO Laws, Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 96th Cong., 1st Sess. 40, 68, 86 (1979) ("1979 Oversight Hearings"). Previously, aggrieved parties routinely waited two or three years to have their charges processed. See *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 363–364 (1977). The average time for processing a charge has been reduced to about two months. 1979 Oversight Hearings 40.

If the fact-finding conference does not result in settlement, the Commission, consistent with its practice since 1965, provides the parties with a determination memorandum which reports the Commission's reasonable cause conclusion and fully describes and evaluates the evidence that it has received. See 29 C.F.R. 1601.21; EEOC Compliance Manual § 40. See also 30 Fed. Reg. 8408–8409 (1965).[6]

B. Associated's Complaint

The Joseph Horne Company ("Horne") is a division of Associated Dry Goods Corporation ("Associated")

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[6]Prior to 1972, Commission investigators also prepared detailed factual findings that were distributed to the parties before the Commission made its "reasonable cause" determination. The parties were then afforded an opportunity to object to the findings and provide additional evidence before the Commission made its determination. See 30 Fed. Reg. 8408 (1965). That procedure was abandoned in 1972 because it contributed to unnecessary delays. See 37 Fed. Reg. 20165 (1972). Since 1977, however, the parties have been afforded a substantially equivalent opportunity to confront the facts and correct the record at oral conferences. See 29 C.F.R. 1601.15, 42 Fed. Reg. 55388 (1977).

and operates several retail department stores in the Pittsburgh, Pennsylvania metropolitan area. Between November 1971 and June 1973, seven Horne employees filed employment discrimination charges with the Commission's Pittsburgh district office (App. 78–84). Six of the charges were filed by women who alleged sex discrimination in promotions, wages, and conditions of employment (App. 79–84). The seventh charge was filed by a black woman, whose employment had been terminated, and who alleged racial discrimination in promotions, wages, and conditions of employment (App. 78). Three of the charging parties also alleged that Horne had retaliated against them for having previously complained to the Commission (App. 79, 82, 84).

In February 1974, the Commission's Pittsburgh office began its investigation by asking Horne to provide certain relevant information, including the charging parties' employment records. Horne stated that it would not provide any information unless the Commission agreed in advance that it would not disclose any such information to the charging parties, to their attorneys, or to any witnesses interviewed during the investigation (App. 26). In accordance with regularly established policy, the director of the Commission's Pittsburgh office declined to provide that assurance. The district director explained that while all investigative materials are not routinely provided to a charging party, the Commission sometimes finds it necessary to discuss portions of such materials with the charging party when the Commission analyzes the factual background of a case (App. 27). The district director also explained that the Commission's rules permit the

charging party, subject to certain conditions, to examine a redacted version of his case file if he contemplates the filing of a civil action (App. 27).

On October 18, 1974, when it had become obvious that Horne intended to persist in its refusal to cooperate, the Commission issued a subpoena in aid of its investigation (App. 38–39). On October 23, 1974, Horne petitioned the Commission for revocation of the subpoena (App. 44–47). That petition was denied on May 9, 1975 (App. 48–54). On June 27, 1975, Associated brought this action[7] in the United States District Court for the Eastern District of Virginia, seeking a declaration that the Commission's disclosure policies were unlawful and an injunction prohibiting the enforcement of the Commission's subpoena (App. 5–16).[8] Associated rested its claim that the Commission's regulations and policies are unlawful on the ground that Sections 706(b) and 709(e) of Title VII, 42 U.S.C. 2000e–5(b) and 2000e–8(e), categorically preclude the Commission from making any pre-litigation disclosure of investigatory information to any person outside the

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[7] Associated alleged that the court had jurisdiction under the Freedom of Information Act, 5 U.S.C. 552; the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.*; 28 U.S.C. 1331, 1337, 1651; the Declaratory Judgment Act, 28 U.S.C. 2201–2203; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*; and the Trade Secrets Act, 18 U.S.C. 1905 (App. 6).

[8] The Commission subsequently brought suit to enforce its subpoena in the United States District Court for the Western District of Pennsylvania. That action was transferred and consolidated with Associated's action in the Eastern District of Virginia (App.92). The district court enforced the subpoena (Pet. App. 25a–31a), and the court of appeals affirmed (Pet. App. 3a–4a). Associated did not petition for further review of that issue.

government, including the parties to the dispute that the Commission is attempting to conciliate.

C. The District Court's Decision

Rejecting the Commission's long-standing interpretation of its organic law, the district court held that Title VII precludes the Commission from disclosing any information to the parties at any time prior to the filing of a lawsuit. The district court based its holding on the District of Columbia Circuit's construction of the "public disclosure" provisions in *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978), in which that court held that those provisions prohibited the Commission from providing individual charging parties with information generated in a system-wide investigation which resulted from the filing of a Commissioner's charge (see pages 8–9, note 5, *supra*). Quoting from *Sears*, the district court held (Pet. App. 22a):

> "An examination of the overall statutory scheme persuades us that Title VII was never meant to permit dissemination of EEOC investigative data to anyone not within the government.
>
> * * * It would do violence to the scheme of negotiation and settlement if the Commission were permitted to encourage numerous private litigants by distributing information from EEOC files before the administrative procedures of Title VII had run their course."

The district court also relied on the District of Columbia Circuit's assertion that the Commission "had no effective means of controlling the manner in which charging parties used information which they obtained from the Commission's files" (Pet. App. 22a–23a).

Thus, the district court entered judgment declaring

the Commission's "procedural regulations found at 29 C.F.R. §§1601.20 and 1610.17(d), and the special disclosure rules found at §83 of the EEOC Compliance Manual * * * to be void, invalid and unenforceable to the extent that they authorize the EEOC to disclose to charging parties any information contained in EEOC investigative files" (App. 111–112). The court also enjoined "the Commission, its agents, employees and all others acting in its behalf * * * from making any such disclosures" (App. 112).

D. The Court of Appeals' Decision

The court of appeals affirmed by divided vote, holding that the "public disclosure" provisions "prohibit EEOC from disclosing investigative materials to the parties prior to suit" (Pet. App. 7a). The court declined to discuss all but one of the Commission's substantive arguments[9] on the ground that those arguments had been thoroughly analyzed, albeit with varying results, by three other circuits (Pet. App. 6a). See *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979); *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978); *H. Kessler & Co.* v. *EEOC*, 472 F.2d 1147 (5th Cir.) (en banc), cert. denied, 412 U.S. 939 (1973). The court considered and rejected the Commission's argument that Congress could not have intended to prohibit all pre-litigation disclosure because such a pro-

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[9]The court of appeals also discussed and rejected (Pet. App. 6a–7a) the Commission's contention that the court's previous decision in *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, 571 F.2d 195 (4th Cir. 1978), supported the Commission's position.

hibition would emasculate the Commission's investigatory and conciliation processes, and thereby defeat major purposes of the statute. The court stated (Pet. App. 6a):

> EEOC contends that a decision prohibiting EEOC from disclosure will unduly restrict it in conducting an investigation as, for example, when EEOC seeks corroboration from the individuals concerned of information supplied by their employer that their qualifications for the position to which they were promoted or for which they were hired were superior to those of the charging party who was not promoted or hired. We think that such corroboration may easily be obtained without violating the statutory restrictions by interrogating those employees on the basis that "it has been said" or "it has been reported" without providing them with letter and verse of the employer's contentions or the specific identity of the representative of the employer advancing the contention.

In dissent, Judge Hall observed that the Commission's long-standing policy of permitting limited disclosure to parties contemplating the filing of lawsuits "discourage[s] meritless litigation, by informing potential litigants of the weakness of their cases, and * * * meritorious suits which may be encouraged by the rules complement, rather than hinder, [the Commission's] own enforcement efforts" (Pet. App. 10a–11a).[10] Judge Hall maintained (Pet. App. 13a):

> The majority's invalidation of the rules will force the individual to file an action, and then learn

[10]Judge Hall noted that he would uphold the Commission's rules insofar as they permit a charging party to inspect his own case file; he would not allow a charging party to have access to other employees' case files (Pet. App. 9a n.2).

through discovery whether he has a meritorious case. I fail to see how this will promote any of the statute's objectives.

SUMMARY OF ARGUMENT

Congress based the enforcement mechanism of Title VII on the premise that it is neither necessary nor desirable for all employment discrimination claims to be resolved in the federal courts. Because Congress recognized that many claims could be resolved without resort to litigation, it provided that parties aggrieved by discrimination could bring suit in federal court only after the Commission had had some opportunity to investigate and attempt to settle the dispute "by informal methods of conference, conciliation and persuasion." Section 706(b) of Title VII, 42 U.S.C. 2000e–5(b). Since the Commission's inception in 1965, conciliation has been a major cornerstone of its enforcement processes, and countless employment discrimination cases have been diverted from an already overburdened judicial system. By invalidating a critical element of the Commission's investigatory and conciliation procedures, the court of appeals has cast serious doubt on the Commission's continued ability to settle discrimination complaints without recourse to the federal courts.

At issue here is the proper construction of the two "public disclosure" prohibitions contained in Title VII. Sections 706(b) and 709(e) of that Title both prohibit the Commission and its employees from "making public," prior to the institution of federal court litigation, any information gathered in the course of an investiga-

tion. Once litigation has been commenced, that prohibition no longer applies.

Since 1965, the Commission has consistently construed these provisions of its organic law to permit limited pre-litigation disclosures of investigative materials to the immediate parties and, in more limited circumstances, to witnesses whose knowledge is necessary to an investigation. That construction, which is entitled to substantial deference, has a substantial basis in the language and legislative history of Title VII and is essential to the effectiveness of the Commission's investigatory and conciliation processes. From the very outset, the Commission has recognized that parties to a conciliation must understand the strengths and weaknesses of their respective cases if conciliation is to be something more than a meaningless formality. When conciliation efforts are successful, the parties necessarily waive their rights to have their claims and defenses adjudicated in a federal court. Common sense, as well as the language and legislative history of the statute, demonstrate that Congress could not have expected that the parties would waive those rights in ignorance. Moreover, the success of the Commission's investigatory and conciliation efforts often depends upon its ability to confront witnesses with certain factual allegations.

Frivolous as well as meritorious charges are more likely to be settled at the conciliation stage if the parties have a realistic view of the facts. Indeed, the court of appeals seriously erred in assuming that the Commission's practice of disseminating information to the parties encourages non-meritorious lawsuits. If a

charging party must file a lawsuit merely to secure the information necessary to evaluate his case, more non-meritorious lawsuits will be filed. Even if it were true that non-disclosure would discourage litigants from filing suit, however, there is no reason to believe that frivolous—rather than meritorious—lawsuits would thereby be weeded out. The decision below simply makes access to the facts depend upon a charging party's ability to sustain the financial burdens attendant upon civil litigation. There is no inherent correlation between the merits of a person's grievance and his ability to pay for legal services. The decision below would greatly impair the effectiveness of the Commission's investigatory and conciliation processes and the important statutory purposes that they serve.

ARGUMENT

I. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF TITLE VII SHOW THAT CONGRESS DID NOT INTEND TO PROHIBIT THE COMMISSION FROM DISCLOSING INFORMATION TO PERSONS DIRECTLY INVOLVED IN THE INVESTIGATION

Sections 706(b) and 709(e) provide for the imposition of criminal penalties against Commission personnel who "make public" information obtained in the course of receiving, investigating and conciliating charges of employment discrimination. Section 706(b) provides that "[c]harges shall not be made public" and that "[n]othing said or done during and as a part of * * * [conciliation] endeavors may be made public * * * without the written consent of the persons concerned." 42 U.S.C. 2000e–5(b). Section 709(e) makes it unlawful, unless litigation has been commenced, for Com-

mission personnel "to make public in any manner whatever any information obtained by the Commission" pursuant to its investigative authority. 42 U.S.C. 2000e-8(e). The question at issue is straightforward: whether Congress intended to include the charging party, the respondent and material witnesses, despite their unique relationship to the dispute, within the statutory "public," to whom no investigatory materials may be disclosed unless litigation has been initiated.

The answer to that question appears on the face of the statute. While Title VII does not purport to define the term "public,"[11] its meaning is clear from the context in which it first appears in the statute: "Charges

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[11] The plain meaning of the term, however, encompasses only those persons who have no particularized interest in the dispute. The legislative development of the Freedom of Information Act, 5 U.S.C. 552, is instructive. Prior to 1966, the public disclosure section of the Administrative Procedure Act provided that even matters of official record could be made available only to "persons properly and directly concerned" with the information (5 U.S.C. (1964 ed.) 1002). In 1966, Congress enacted the Freedom of Information Act which, by contrast, provides that information shall be made available to "the public" (5 U.S.C. 552). This Court noted in *EPA* v. *Mink*, 410 U.S. 73, 79 (1973), that "[t]he Act eliminates the 'properly and directly concerned' test of access, stating repeatedly that official information shall be made available 'to the public,' 'for public inspection.' " Indeed, this Court has repeatedly held that the Information Act affords no special consideration to persons who may indeed have a particularized interest in disclosure. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 22 (1974). See also *Miers* v. *Brownlow*, 21 F.2d 376, 378 (S.D. Ala. 1927) (statute excluding the "public" from an immigration hearing held not to apply to an immigrant's attorney, but only to "those who attend out of curiosity").

shall not be made public by the Commission." Section 706(b) of Title VII, 42 U.S.C. 2000e–5(b). If this provision were construed to prohibit dissemination of charges to a "public" that encompassed the charging party and the respondent, it would have no meaning. The substance of a charge cannot be concealed from the charging party, who is the author of the charge. Likewise, the statute requires that the respondent be given notice of the charge within ten days after it has been filed.[12] It would make no sense, therefore, to make the respondent part of the "public" from whom the Commission must withhold the allegations contained in the charge. Section 706(b) further provides that matters occurring during conciliation may not be "made public * * * without the written consent of the persons concerned." This provision also demonstrates that Congress did not intend to include the immediate parties within its definition of the "public" to whom

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[12] Since 1972, Section 706(b) of Title VII, 42 U.S.C. 2000e–5(b), has provided that "the Commission shall serve a notice of the charge (including the date, place and circumstance of the alleged unlawful employment practice) on such employer * * * within ten days." Prior to 1972, this provision was contained in Section 706(a) of Title VII, 42 U.S.C. (1970 ed.) 2000e–5(a), which required the Commission to "furnish such employer * * * with a copy of such charge * * * provided that such charge shall not be made public by the Commission." 78 Stat. 259. The legislative history of the 1972 amendments suggests that Congress inserted this change to permit the Commission to protect from disclosure the identity of the charging party, when necessary to further the aims of the statute. 118 Cong. Rec. 4941 (1972). Cf. *Chromcraft Corp.* v. *EEOC*, 465 F.2d 745, 748 (5th Cir. 1972). In general, the Commission has continued its practice of serving the respondent with a copy of the charge. See 29 C.F.R. 1601.14; EEOC Compliance Manual §§ 10.1, 10.2.

disclosure is prohibited. The very concept of conciliation assumes that the parties to the process will be privy to what is said and done during conciliation negotiations, including such matters as proposals or rejections of settlement offers and counter-offers. The contrary view is simply illogical, as the Fifth Circuit recognized in *H. Kessler & Co.* v. *EEOC*, *supra*, 472 F.2d at 1151: "It would indeed be anomalous if the parties, whose written permission is required in order to publicize what was 'said or done,' would themselves have been considered by Congress to be members of the 'public' to whom disclosure is prohibited."

Moreover, Section 706(b) does not simply instruct the Commission to interview the parties, but requires that an "investigation" be conducted. Charges of employment discrimination are frequently accompanied by intense feelings, and evidence supplied by disinterested witnesses is often more reliable than accusations offered by the parties themselves. Yet, as Senator Humphrey recognized in the debates preceding the enactment of Title VII (see pages 23–24, *infra*), witness interviews are a two-way street: information must sometimes be disclosed to secure other information. Where interviews are conducted for the purpose of corroborating or refuting the parties' factual assertions, those assertions must sometimes be disclosed to the witness. Moreover, witnesses may frequently be called upon to authenticate documentary evidence, in which case disclosure of the document involved is essential. Because the statute requires that the Commission investigate charges, and it is often impossible to conduct a meaningful investigation without disclosing

some information to some witnesses, the plain language of the statute permits limited disclosures to witnesses.

In short, Section 706(b) could not be read consistently and as a whole if its reference to the "public" did not exclude parties directly involved in the administrative proceeding. It is likewise clear that Congress could not have intended to use the same language to convey a different meaning in Section 709(e) of Title VII, 42 U.S.C. 2000e–8(e): "If such had been [Congress'] intent, it seems as though it would have expressed itself in different language, and not by a phrase so suggestive, from past use, of a more limited purpose." *Marks* v. *United States*, 161 U.S. 297, 303 (1896). As the Fifth Circuit said in *H. Kessler & Co.* v. *EEOC*, *supra*, 472 F.2d at 1151 (footnote omitted), "[t]hese two sections treat of essentially the same subject matter, i.e., the powers and duties of the Commission in following up a charge of employment discrimination, and, thus, absent any clear indication in the statutes to the contrary, we think they should be read in a manner consistent with one another."

While the legislative history of the "public disclosure" provisions is somewhat sparse, it unequivocally supports the view that Congress did not intend to preclude dissemination of information to the parties or to material witnesses. The "public disclosure" provisions were not part of the bill originally passed by the House,[13] but were inserted as part of the Senate substitute bill that was sponsored by Senators Dirksen

[13]The original House bill had provided only that "[n]othing said or done during and as a part of such endeavors may be used

and Humphrey and became law when passed without amendment in the House. See 110 Cong. Rec. 12819 (1964). Senator Humphrey clearly explained that the purpose of the "public disclosure" provisions was to prevent wide dissemination of unproved charges of discrimination, not to prevent the Commission from making necessary disclosures to persons who had either a particularized interest in the charge or knowledge of facts that were essential to the Commission's investigation. Senator Humphrey said (110 Cong. Rec. 12723 (1964) (emphasis added)):

> [*T*]*his is a ban on publicizing and not on such disclosure as is necessary to the carrying out of the Commission's duties under the statute.* Obviously, the proper conduct of an investigation would ordinarily require that the witnesses be informed that a charge had been filed and often that certain evidence had been received. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal

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as evidence in a subsequent proceeding." H.R. Rep. No. 88-914, 88th Cong., 1st Sess. 12 (1963). Senator Dirksen proposed that "made public" be inserted in this provision. 110 Cong. Rec. 8192 (1964). It should also be noted that the House bill, while not containing a subsection specifically prohibiting the disclosure of investigative information, did incorporate the provisions of Section 10 of the Federal Trade Commission Act, 15 U.S.C. 50, which prohibits Commission employees from making "public any information obtained from the Commission without its approval." That Section prohibits only those disclosures that have not been authorized by the Commission. 16 C.F.R. 4.10(c). Moreover, the FTC rules provide for disclosure of materials to the parties. 16 C.F.R. 3.36. The purpose of the House provision was likewise limited to prohibiting "unauthorized" disclosures. See 110 Cong. Rec. 7214 (1964).

> agencies, but rather is aimed at the making available to *the general public* of unproven charges.

Senator Humphrey realistically recognized that an effective investigation could not be carried out unless the Commission were able to discuss its understanding of the parties' factual assertions with witnesses from whom the Commission might seek corroboration or refutation of those assertions. If disclosures to mere witnesses are "ordinarily require[d]," disclosures to the parties are clearly essential.

That Congress intended to distinguish between disclosures to the general public and disclosures to persons necessarily involved in the investigation is further evidenced by Senator Dirksen's remarks. As part of a package of amendments, some of which were later incorporated in the substitute bill that was enacted, Senator Dirksen proposed that conciliation discussions not be "made public." 110 Cong. Rec. 8193 (1964). (See pages 22–23, note 13, *supra*.) He explained (110 Cong. Rec. 8193 (1964)):

> The maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in privacy. If voluntary compliance with this title is not achieved, the dispute will be fully exposed to public view when a court suit is filed.

Clearly, Senator Dirksen's concern was also limited to "publicizing."

In sum, the statutory language and its legislative history[14] both demonstrate that Congress did not in-

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[14] Senator Dirksen also discussed the "public disclosure" provisions in a memorandum which sets forth the differences be-

tend to prohibit the Commission from disclosing information to the parties when Congress enacted the "public disclosure" provisions of Title VII.

II. THE COMMISSION'S CONSISTENT INTERPRETATION OF ITS STATUTE SINCE 1965, AND CONGRESS' ACQUIESCENCE IN THAT INTERPRETATION, FURTHER DEMONSTRATE THAT CONGRESS DID NOT INTEND TO PROHIBIT THE COMMISSION FROM DISCLOSING INFORMATION TO PERSONS DIRECTLY INVOLVED IN THE ADMINISTRATIVE PROCEEDING

Shortly after the Commission was established in 1965, it adopted regulations interpreting Sections 706(b) (then 706(a)) and 709(e) to permit "disclosures to the charging party, the respondent, witnesses, and representatives of interested Federal, State or local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under the Title." 30 Fed. Reg. 8407 (1965). In the past fifteen years, the Commission has not varied from that contemporaneous construction of its statute, and Congress has never indicated that that construction does not comport with its legislative intent.

No principle of administrative law is more fundamental than that which requires deference to be given to the contemporaneous construction of a statute by those whom Congress has "'charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are

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tween the bill which had originally passed the House and the Senate substitute. See 110 Cong. Rec. 12819 (1964). His explanation of the "public disclosure" provisions simply tracks the statutory language. *Ibid.* There is no further legislative history concerning these provisions.

yet untried and new.'" *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961). As this Court said in *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965), "administrative agencies and administrators * * * will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved." Accord *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524–525 (1978); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434 (1971); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). Those principles apply with special force where, as here, the area of regulation is itself unique.

An agency's contemporaneous construction of its organic statute is entitled to particular deference when it has withstood the test of time. See *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). It is now fifteen years since the Commission first promulgated its construction of the "public disclosure" provisions of Title VII. The Commission has consistently adhered to that construction throughout the intervening years, and Congress has never indicated its disapproval. In 1972, Congress exhaustively reconsidered and substantially amended certain provisions of Title VII, but it made no material changes in either of the "public disclosure" provisions.[15] This Court has often held that "the silence of Congress in

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[15] In 1972, Congress amended Section 706(b) by substituting "persons concerned" in place of "the parties" in the provision requiring consent prior to the disclosure of conciliation materials. The legislative history contains no evidence that any substantive change was intended. Indeed, the conference report continues, despite the change, to state that Section 706 condi-

the face of the long continued [executive] practice * * * must be considered as 'equivalent to consent to continue the practice until the power [is] revoked by some subsequent action by Congress.'" *United States* v. *Jackson*, 280 U.S. 183, 196–197 (1930). Accord *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); *Chemehuevi Tribe* v. *FPC*, 420 U.S. 395, 409–410 (1975); *Farmers Union* v. *WDAY*, 360 U.S. 525, 532–533 (1959); *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932). See also 2A C. Sands, *Sutherland on Statutory Construction* §49.09 (4th ed. 1973).

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tions disclosure upon "the consent of the parties." S. Rep. No. 92–681, 92d Cong., 2d Sess. 16 (1972). It should be noted, however, that Congress also amended Section 706(b) to permit charges to be filed "on behalf of" an aggrieved person, without disclosure of his identity, and it may well be that Congress adopted the phrase "persons concerned" to conform to that change. See 118 Cong. Rec. 4941 (1972).

Section 709(e) was not amended in 1972. However, the Senate bill had proposed renumbering Section 709(e) as Section 709(f) and inserting a new Section 709(e), which would have prohibited the Commission from "disclos[ing] any record or paper" required to be kept by the statute, except to Congress, government agencies, or in proceedings before a court or grand jury. S. Rep. No. 92–415, 92d Cong., 1st Sess. 67 (1971); 118 Cong. Rec. 4943 (1972). The section was deleted in conference without explanation. Although this action may be equivocal, it cannot be inferred that Congress thought the proposed section unnecessary on the ground that the existing provision already contained that restriction. Such an inference would have been baseless in light of the Commission's published regulations. But see *Sears, Roebuck & Co.* v. *EEOC*, *supra*, 581 F.2d at 948 n.9. The only reasonable inference to be drawn is that Congress determined that the statutorily required records deserved no greater protection than that afforded to other information in the Commission's possession. See *H. Kessler & Co.* v. *EEOC*, *supra*, 472 F.2d at 1150–1151; cf. *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 17 (1953).

In these circumstances, it must be assumed that Congress has approved the agency's construction.

III. THE COMMISSION'S ABILITY TO DISCLOSE INFORMATION TO THE PARTIES AND TO MATERIAL WITNESSES DURING THE ADMINISTRATIVE PROCESS IS ESSENTIAL TO THE PERFORMANCE OF ITS STATUTORY FUNCTION TO INVESTIGATE, MAKE A DETERMINATION AS TO REASONABLE CAUSE, AND CONCILIATE CHARGES OF DISCRIMINATION

Senator Humphrey, one of the chief architects of Title VII, recognized more than sixteen years ago that some information would have to be disclosed to parties and witnesses if the Commission were to perform its statutory functions. The Commission's fifteen years' experience in administering Title VII has confirmed the validity of that prediction.

Commission investigations perform three functions: (1) to provide the Commission with an adequate factual basis for determining whether there is reasonable cause to believe that a charge is true; (2) to provide an adequate factual basis for holding meaningful settlement discussions with the parties; and (3) to provide an adequate factual basis for determining whether litigation should be commenced if conciliation fails. Because the purpose of Commission investigations is to produce an accurate account of the relevant facts upon which to base agency action, it is essential that Commission investigators be able to confront the parties with their adversaries' evidence. Unless the parties are allowed to answer or refute such evidence, the Commission's investigative results will necessarily be suspect. Moreover, to the extent that corroboration or refutation by disinterested witnesses is likely to be

more reliable than statements made by the parties themselves, it is inevitable that a proper investigation may sometimes require disclosure of evidence and, in some cases, the existence of the charge, to such witnesses.

1. *Investigation.*

The Commission's current investigatory procedures, which were promulgated in 1977,[16] depend upon early and direct disclosure of information to the parties. See Senate Reorganization Hearings 81, 93–100. When a charge is made, the Commission requires that the charging party provide a detailed statement of the relevant facts. EEOC Compliance Manual § 2.3. The Commission then gives notice to the respondent, who is also sent a questionnaire requesting factual information and documents relating to the charge. EEOC Compliance Manual §§ 10, 14.4(e), 14.5(a). When the Commission receives a response from the employer, it schedules an informal fact-finding conference, in which the parties, their attorneys (who may act only as advisors), and a Commission representative meet to discuss their respective positions and determine what fac-

[16] The Commission's pre-1977 procedure proved time-consuming and ineffective. The Commission's experience since 1977 indicates that earlier disclosure of information results in a larger number of settlements and a shorter processing time. In contrast to the 14% settlement rate under the previous system, where disclosure often occurred only when the Commission decided whether reasonable cause existed, the Commission has achieved a 44% settlement rate under the new system, where both sides have been given the evidence and required to evaluate their respective cases at an early stage in the proceedings. Charges have also been processed on a greatly accelerated basis under the new system. See pages 8–10, *supra*.

tual issues are actually in dispute. *Id.* at § 14.7. The fact-finding conference is "primarily an investigative forum intended to define the issues, determine which elements are undisputed, to resolve those issues that can be resolved, and to ascertain whether there is a basis for negotiated settlement of the charge." 29 C.F.R. 1601.15(c). As the Commission's Chair has testified, the conference "gets the facts out much more quickly than months and sometimes years of shuffling papers * * * [and] makes both parties more realistic about the merits of each side and sets the stage for settlement." Senate Reorganization Hearings 81. Frequently, the Commission representative must disclose facts within the Commission's knowledge to resolve factual disputes, to enable each party to rebut the other's allegations, and to reassure each party that the other is not withholding relevant data.[17] It is the face-to-face discussion of the facts which tends to moderate positions and cause the parties to arrive at a settlement.

Substantially similar charges are often consolidated for investigation if they are filed at approximately the same time. In other instances, the Commission's investigation may draw upon information that was generated in an earlier investigation of the same employer.

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[17] Respondents have refused to attend fact-finding conferences on the basis of the decision below. While Section 710 of Title VII, 42 U.S.C. 2000e-9, authorizes the Commission to subpoena a party's attendance at such a conference, the Commission could not compel disclosure of factual information at the conference if the Fourth Circuit's construction of Section 709(e) is correct. Consequently, a recalcitrant party could make the conference a meaningless and perfunctory exercise.

Because the facts relevant to an individual's case may be contained in other case files, the Commission has construed Section 709(e) to permit disclosure to the parties of statistical and other directly relevant information obtained in a prior or concurrent investigation of substantially similar charges against the same employer. EEOC Compliance Manual § 83.7(c) (Pet. App. 43a–45a). See also *Mosley* v. *General Motors Corp.*, 10 F.E.P. Cas. 1442, 1445, 10 Empl. Prac. Dec. ¶10,380 at 5627 (E.D. Mo. 1975).[18] The reasons supporting that policy are compelling. On the one hand, it would squander the Commission's limited resources to require it to retrace its steps each time that a substantially similar charge is filed. On the other hand, it would be both unreasonable and unfair to permit the first charging party to have full access to relevant information, while limiting later charging parties to whatever information the Commission happens to have placed in their respective files. See *Burlington Northern, Inc.* v. *EEOC*, *supra*, 582 F.2d at 1101 n.9. Because the charges in this case have been consolidated for investigation, the disclosure of the materials contained in the consolidated investigation files will be as essential to the success of the administrative proc-

[18] Disclosure of such information may also occur during formal conciliation efforts or pre-litigation case file evaluation. Because the District Director is familiar with the procedures used and the cases being investigated within his jurisdiction, the Commission has delegated to him the discretion to determine what evidence is relevant and material and when such evidence should be disclosed. See EEOC Compliance Manual § 83.7(c) (Pet. App. 43a–45a). In effect, pertinent materials in other investigative files relating to the same employer are thus incorporated by reference into another investigation.

ess as is disclosure of a single investigative file in an isolated case. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804–805 (1973) (statistics and other information about an employer's general policy and practice are probative in evaluating an individual claim of discrimination).[19]

2. *The Reasonable Cause Determination and Conciliation*

If the dispute is not resolved at the fact-finding conference, the Commission continues its investigation and then begins formal conciliation efforts. When the Commission completes its investigation, it issues a determination of whether there is reasonable cause to believe that the charge is true.[20] 29 C.F.R. 1601.21.

[19] In two previous cases, the courts of appeals disagreed in some respects with the Commission's construction of the "public disclosure" provisions of Title VII. See *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979); *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978). Both of those cases involved the Commission's practice of disclosing to individual charging parties, as "pre-litigation disclosure" (see pages 36–42, *infra*), the materials generated in a system-wide investigation based on a Commissioner's charge. In neither case did the courts of appeals consider the destructive effects that their construction would have on the administrative process as a whole. While the Commission believes that the courts of appeals erred in construing the statute to preclude pre-litigation disclosure of systemwide files to individual charging parties, that issue is not presently before the Court because no Commissioner has filed a charge against Associated and no system-wide investigation has been conducted here. To the extent that Associated might seek to attack the Commission's regulations concerning dissemination of system-wide investigatory files generated in response to a Commissioner's charge, that attack would be entirely hypothetical.

[20] In most cases, the Commission attempts to obtain a

The Commission's written determination ordinarily contains a statement and evaluation of the facts and sets forth the basis for the Commission's conclusions. EEOC Compliance Manual § 40.7 Copies of the determination are given to both parties. *Id.* at § 40.11. The Commission's factual discussion serves an important function in that both parties are thereby informed of those practices that the Commission is prepared to attempt to correct through conciliation or, alternatively, through the possible filing of a Commission lawsuit. *EEOC* v. *Hearst Corp.*, 553 F.2d 579 (9th Cir. 1977); *EEOC* v. *General Electric Co.*, 532 F.2d 359, 366–371 (4th Cir. 1976). See also *General Telephone Co.* v. *EEOC*, No. 79–488 (May 12, 1980), slip op. 12. The practices thus identified may be narrower or broader than the original charge. The reasonable cause determination can serve as a spur to conciliation and settlement only if it contains a factual statement that informs both parties of the specific factual bases for the Commission's conclusion. If Section 709(e) applies to the parties, all but the most conclusory factual information must be omitted. See *Sears, Roebuck & Co.* v. *EEOC*, *supra*, 581 F.2d at 949 n.11.

"negotiated settlement" before a reasonable cause determination is issued. 29 C.F.R. 1601.20; EEOC Compliance Manual § 15. In the event that a settlement is reached in this manner, the settlement agreement specifically states that the Commission has made no judgment on the merits. *Ibid.* Before issuing a reasonable cause determination letter, the Commission also conducts a "pre-determination" interview to afford each party a final opportunity to present rebuttal evidence or indicate his willingness to settle the dispute. EEOC Compliance Manual § 27. Evidence which the Commission may use in its determination is discussed at such conferences.

The conciliation process cannot successfully resolve disputes if the Commission is categorically prohibited from disclosing relevant factual information to the parties. It is only through knowledge of the facts that the parties can assess the strengths and weaknesses of their respective positions and thus engage in meaningful settlement negotiations. As this Court said in *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 21-22 (1974), "negotiation is a bargaining process, with give and take, and with stress upon and use of the strengths of one's own position and the weaknesses of the position of the other party." The parties are not likely to reach a settlement if they have insufficient facts to analyze their respective positions. Even if the parties were able to reach a general agreement to settle the dispute, however, the terms of an agreement could not be formulated or evaluated without factual information. For example, an employer might be willing in principle to settle a case, but he would certainly not agree to pay a specific sum in back pay relief without ascertaining the extent of a former employee's interim earnings. See Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g).

That rights created by a federal statute should be enforced without requiring the aggrieved party to hire a lawyer or file a lawsuit is a somewhat novel feature of Title VII. Congress recognized that many employment discrimination claims could—and should—be settled without recourse to an already overburdened judicial system. That many aggrieved persons would be unable to bear the financial burdens routinely incurred in civil litigation clearly influenced Congress in di-

recting that the Commission attempt to resolve disputes "by informal methods of conference, conciliation, and persuasion." Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b). Unless an aggrieved person consents to the terms of a Commission-negotiated settlement, however, he retains the right to file a civil action. Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1). See *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 364 (1977); *McClain* v. *Wagner Electric Co.*, 550 F.2d 1120-1121 (8th Cir. 1977). If the charge is settled at the conciliation stage, the parties thereby waive their rights to have their dispute adjudicated by a federal court. It would be unreasonable to assume, without any basis in the legislative history, that Congress intended that either party should be required to waive that right without full awareness of the facts elicited by the Commission's investigation. Cf. *D.F. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 185 (1972).[21]

The Fourth Circuit's construction of the statute—which would, in comparison, compel aggrieved persons to negotiate in the dark—would not encourage prelitigation settlements. To the contrary, because Section 709(e)'s disclosure prohibition has no application after a suit has been filed, charging parties who are able to do so may feel compelled to bring suit as a dis-

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[21] That burden would fall more heavily, of course, on charging parties. Most charging parties are not represented by counsel at the conciliation stage and, unlike most respondents, they have limited resources for conducting an independent investigation. Charging parties labor under another disability at the conciliation stage in that they must not only persuade respondents that their claims have merit, but also that they are prepared to enforce those claims through litigation if necessary.

covery mechanism, solely to obtain sufficient information to determine whether they should settle. If a charging party must file suit to secure information for evaluating his case, one of the fundamental purposes of conciliation—to keep unnecessary litigation out of the federal courts—will be undermined.

3. *Pre-Litigation Case File Evaluation.*

An aggrieved person may file a civil action even if the Commission has not entered a determination of reasonable cause. Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1). While the Commission has no authority to prevent the filing of a meritless lawsuit, the facts themselves may persuade the charging party and his attorney that the case is not worth pursuing. Since 1965, the Commission has permitted charging parties to inspect their investigative files in anticipation of litigation.[22] Unless the charging party establishes a "compelling need" for the information (see *Drew* v. *Liberty Mutual Ins. Co.*, 480 F.2d 69 (5th Cir. 1973), cert. denied, 417 U.S. 935 (1974)), however, the file may not be inspected until either the 180-day period has expired or a "right to sue" letter has issued, whichever occurs first. EEOC Compliance Manual

[22] Because Section 706(b) prohibits disclosure of conciliation matters without the consent of the persons concerned, offers and counter-offers are revealed to the parties only during settlement discussions, and only to the extent necessary to conduct such discussions. Not even the parties are subsequently given access to conciliation materials. However, if any factual material—which could have been obtained in the investigation—is provided to the Commission during conciliation, that material is deemed subject to Section 709(e), not Section 706(b). See 29 C.F.R. 1601.26(b); EEOC Compliance Manual § 83.6(f) (Pet. App. 40a-41a).

§ 83.3(a) (Pet. App. 35a).[23] Confidential materials, such as statements by witnesses who have been promised anonymity and data concerning other respondents, are not disclosed. EEOC Compliance Manual § 83.6 (Pet. App. 39a–41a). Moreover, information is disclosed only if "the person requesting disclosure agree[s] in writing not to make the information obtained public except in the normal course of a civil action or other proceeding instituted under Title VII." EEOC Compliance Manual § 83.3(b) (Pet. App. 35a, 38a).[24]

Without any factual basis, the court of appeals here concluded that the Commission's disclosure policies are

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[23]The Commission may issue a "right to sue" letter before the expiration of the 180-day period if it has either dismissed the charge or completed its administrative processing of the charge prior to that time. 29 C.F.R.1601.19(f), 1601.28(b). The Commission may also issue a "right to sue" letter before the expiration of the 180-day period if "the District Director, the Area Director, the Director of the Office of Field Services or the Director of the Office of Systemic Programs has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect." 29 C.F.R. 1601.28(a)(2). In such cases, the Commission may permit inspection of the charging party's file before 180 days have elapsed.

[24]The district court concurred (Pet. App. 23a) in the *Sears* court's view that, " 'As there is nothing to prevent charging parties from redistributing what they receive from the EEOC to whomever they please, distribution of investigative file data to charging parties would be tantamount to distribution to the public at large.' " That view ignores the existence of the contract which charging parties are required to sign. That contract is clearly enforceable, and the Commission could protect the integrity of its procedures by bringing an action for injunctive relief and compensatory and punitive damages against any

unwise in that they allegedly undermine conciliation and propel litigants into court. That conclusion is unwarranted for several reasons. First, disclosure of information cannot make a weak case into a strong one. While a charging party may be persuasive in convincing an attorney that he has been wronged, the record will speak for itself. If counsel examines the file and makes a realistic appraisal of the facts, he is more likely to persuade his client that a weak case is not worth pursuing. If the administrative file demonstrates that the charging party's case is not worth litigating, disclosure is to the advantage of everyone, including the respondent and the court, because all may be spared the burden of unnecessary litigation. If, on the other hand, the administrative file demonstrates that the charging party's claim is strong, the aims of the statute will also be served by disclosure. See Comment, *The Meaning of "Public" In Section 709(e) of The 1964 Civil Rights Act And Access to Information Gathered By The EEOC*, 67 Ky. L.J. 430 (1978–1979).

Second, Section 709(e) clearly permits public disclo-

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party who failed to abide by the terms of the contract. See *United States* v. *Snepp*, 595 F. 2d 926, 934 (4th Cir. 1979), reversed in part and remanded, Nos. 78–1871, 79–265 (Feb. 19, 1980); *Brown* v. *Coates*, 253 F.2d 36, 39 (D.C. Cir. 1958). Moreover, as a third-party beneficiary, the respondent presumably could bring an action for damages or injunctive relief. See *Hendrick* v. *Lindsay*, 93 U.S. 143, 149 (1876); *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847, 850 (5th Cir.), cert. denied, 388 U.S. 911 (1967). In fact, the Commission is not aware of a single instance in which a charging party has ever violated the agreement. Charging parties generally look to conciliation and litigation—rather than publicity— for redressing their grievances.

sure of information after litigation has been commenced. The real effect of the Fourth Circuit's holding, therefore, is to require charging parties to file civil actions to secure the facts necessary to make a reasoned evaluation of their claims. The imposition of that burden on charging parties—who are not likely to be wealthy—is warranted neither by the statute nor by considerations of judicial economy. Moreover, litigation takes on a life of its own. Once the charging party and his attorney have invested the resources necessary to the filing of a lawsuit, they may be less likely to abandon even a meritless claim. As Judge Hall noted in dissent, it is not sound policy, and it does not comport with the statutory scheme and purposes, to "force the individual to file an action, and then learn through discovery whether he has a meritorious case" (Pet. App. 13a).[25]

Third, disclosure is not likely to affect conciliation efforts because the Commission currently processes most charges within approximately sixty days. In most cases, therefore, conciliation will have succeeded or

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[25] In *Sears, Roebuck & Co.* v. *EEOC*, *supra*, the court speculated that disclosure of investigatory files might chill an employer's willingness to submit information voluntarily. Except for the present case and *Kessler*, however, there are no reported decisions in which an employer has refused to cooperate on that ground. Moreover, the employer must expect that investigatory information may be used by the Commission in any litigation brought by the Commission, and the statute clearly provides that such information may be disclosed to a private plaintiff, in any event, *after* litigation is commenced. It is not reasonable to believe that the possibility of pre-litigation disclosure to an aggrieved person would have any effect, even as a theoretical matter, on an employer's willingness to cooperate with the Commission.

failed prior to disclosure. Even if such disclosure did have any adverse impact on conciliation, however, it must be remembered that the elimination of unlawful employment practices—not conciliation—is the principal purpose of Title VII. Both private and Commission litigation in furtherance of that purpose are essential elements of Title VII enforcement.[26] While Congress empowered the Commission to bring Title VII enforcement actions in 1972, "the private right of action remains an essential means of obtaining judicial enforcement of Title VII." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974).[27] Moreover, the

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[26] In some cases, the filing of a suit may itself spur settlement of Title VII disputes. See *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 757, 764 (3d Cir. 1971); *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1201 (1971).

[27] The Section-by-Section analysis of the 1972 amendments clearly demonstrates that private litigation remains an important part of Title VII enforcement (118 Cong. Rec. 7565 (1972)):

> The retention of the private right of action * * * is intended to make clear that an individual aggrieved by a violation of title VII should not be forced to abandon the claim merely because of a decision by the Commission or the Attorney General as the case may be, that there are insufficient grounds for the Government to file a complaint. Moreover, it is designed to make sure that the person aggrieved does not have to endure lengthy delays if the Commission or Attorney General does not act with due diligence and speed. Accordingly, * * * the person aggrieved [may] elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.
>
> It is hoped that recourse to the private lawsuit will be the exception and not the rule * * * . However, as the individual's rights to redress are paramount under the provi-

private litigant retains the unique role of a "private attorney general" as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 481 (1978), quoting *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

Moreover, it is the charging party's role as a "private attorney general" that distinguishes Title VII from laws in which agencies are solely responsible for enforcement; it is also that role which distinguishes charging parties from the public and justifies disclosure to them of the facts uncovered by the Commission's investigation, in order to enable them—and their counsel—to determine whether a suit is warranted.[28] "In order to assist the 'private attorney gen-

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sions of Title VII, it is necessary that all avenues be left open for quick and effective relief.

See also *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 363-366; *General Telephone Co.* v. *EEOC*, *supra*, slip op. 7, 14. Because of the Commission's limited resources, it cannot sue on every individual charge, but gives first priority to "pattern and practice" cases. 1979 Oversight Hearings 75.

[28]The charging party typically approaches an attorney with only his version of the events and, perhaps, a brief statement by the Commission stating whether it believes that "the claim has sufficient merit to warrant litigation." EEOC Compliance Manual § 40.1. An attorney could not possibly make an independent evaluation of the case on the basis of this information alone. While an experienced attorney may well see merit in a case that the Commission has found deficient, he is unlikely to undertake a time-consuming factual investigation simply to make that initial determination, particularly in light of the fact that the case will probably be one in which he has to rely on a contingent fee contract or an award of attorney's fees in any event. Moreover, a hasty decision to take the case may ultimately result in an adverse fee award. See *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 421. While Title VII guarantees that a

eral' in fulfilling his duties, it is clearly appropriate to make available to him the resources of the government agency which is charged with the same duties." *National Electrical Contractors Association* v. *Walsh*, 15 F.E.P. Cas. 1158, 1160, 12 Empl. Prac. Dec. ¶11,116 at 5168 (D. D.C. 1976). The very fact that a charging party need not await the completion of conciliation or any other action by the Commission demonstrates that the victim's right to obtain relief is paramount. Any adverse effect on conciliation is a result of a policy judgment on the part of Congress. See *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 461 (1975).

Limited disclosure of investigatory information is essential to the Commission's fulfillment of its statutory mandate at virtually every step of the administrative process. While the court of appeals focused on only a single aspect of that process—witness interviews—it is noteworthy that even in that limited area the court was unable, in substituting its judgment for that of the Commission, to formulate a rule that would satisfy its construction of the statute as well as permit the Commission to perform its statutory functions. The court of appeals recognized the need for some disclosure when it suggested that the Commission could adequately investigate charges by prefacing factual statements to witnesses with such circumlocutions as " 'it has been said' or 'it has been reported' without providing * * * letter and verse of the em-

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charging party may seek judicial relief, even after the Commission has found no reasonable cause (*McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 798–799), that right may be illusory if the charging party's prospective attorney may not inspect the Commission's investigatory file.

ployer's contentions or the specific identity of the representative * * * advancing the contention" (Pet. App. 6a).

The court of appeals' proposal fails on two grounds. First, Section 709(e) provides that "[i]t shall be unlawful * * * to make public in any manner whatever any information obtained by the Commission." 42 U.S.C. 2000e-8(e). If parties and witnesses must indeed be considered members of the public, even the court of appeals' indirect method of disclosure would appear to be unlawful. Second, the court of appeals' proposal is clearly inadequate for accomplishing the Commission's statutory duty to investigate. For instance, the Commission may require authentication of documentary evidence, but a witness will not often be able to authenticate a document without examining it. Moreover, to reveal the contents of a document or a statement may be tantamount to disclosure of the document or statement itself. It is simply unrealistic to believe that Congress intended criminal liability to hinge on an investigator's ability to tread the fine line between disclosing information indirectly and providing "letter and verse." Most important, the court of appeals' proposal ignores common experience by assuming that sources of information are fungible. A witness or charging party may tell a story that is internally consistent and incapable of direct refutation. While that person's reputation for mendacity or history of mental illness would certainly be entitled to substantial weight in such circumstances, the court of appeals' formulation would ordinarily preclude the Commission from ascertaining such critical facts.

The court of appeals' decision, which is based on an apprehension of hypothetical abuses that have never occurred, thus fails on its own terms. More important, that decision is inconsistent with the language, legislative history and purposes of Title VII.

CONCLUSION

The judgment of the court of appeals should be reversed, except insofar as that judgment affirmed the district court's enforcement of the Commission's subpoena.

Respectfully submitted.

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